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Pinkette Clothing, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PINKETTE CLOTHING, INC.,

Plaintiff,

v.

COSMETIC WARRIORS LIMITED, et al.,

Defendants.

AND RELATED COUNTERCLAIMS

CASE NO. 15-CV-4950 SJO (AJWx)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* NO. 4 TO EXCLUDE HIBBARD AND ISAACSON

Hearing
Date: January 24, 2017
Time 9:00 a.m.
Crtrm: 10C
Judge: Hon. S. James Otero

Pretrial Conf. Date: January 17, 2017
Trial Date: January 24, 2017

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to the Central District of California's ADR Program, the parties mediated this dispute on June 20, 2016 in front of a neutral selected from the Court's Mediation Panel. *See* Dkts. 28, 38. As part of that process, the parties exchanged mediation statements. During expert discovery, Drs. Hibbard and Isaacson, experts for Plaintiff Pinkette Clothing, Inc. ("Pinkette"), reviewed the mediation statement of Defendant Cosmetic Warriors Limited ("CWL"), but did not rely upon it in forming any of their opinions. Pinkette's experts disclosed this fact on their reports, which were served in early October 2016. Now, over two months later, CWL argues for the first time that Pinkette's experts should be excluded as expert witnesses solely on the basis that they reviewed CWL's mediation statement, despite their lack of reliance on it.

CWL's inexplicable delay in bringing this motion suggests that it knows it has not been harmed by this disclosure, and further suggests that this motion is nothing more than an attempt to maximize potential prejudice to Pinkette by waiting until the last minute when there is insufficient time to implement the simple remedy of substitute experts. This is confirmed by the fact that CWL's motion cavalierly flouts the very mediation-confidentiality rules that it feigns interest in vindicating.

Moreover, CWL rests its claim to the extraordinary relief it requests on three unpublished district court opinions from outside of California. That, however, is not because there is no better authority on point, but rather because CWL presumably knows that its motion is procedurally improper under the governing rules, which require that alleged violations of the court's mediation process be brought before the mediator and *not* presented to the presiding judge. CWL's motion is also legally insufficient under Ninth Circuit precedent (which CWL has neglected to cite). CWL's failure to discuss these authorities (or to even bring

them to the Court's attention) constitutes a violation of Federal Rule of Civil Procedure 11(b), and underscores that its motion is nothing more than an improper attempt to harass Pinkette. Accordingly, Pinkette respectfully requests that the Court deny CWL's motion in its entirety.

II. ARGUMENT

A. In bringing this fabricated dispute to the Court's attention, CWL has violated the very mediation rules it now feigns interest in upholding.

CWL's motion is premised on the notion that it is deeply concerned with upholding the sanctity of mediation statements. The truth is that CWL is manufacturing a dispute, which it intentionally delayed in raising so as to maximize the prejudice to Pinkette should its gambit be successful. CWL's inexplicable delay is good evidence of both the lack of harm and its true intent. Equally revelatory is the fact that CWL's motion itself cavalierly flouts the very mediation-confidentiality rules CWL claims to be interested in vindicating.

CWL's allegations arise in the context of a mediation conducted before a neutral selected from the Central District of California's Mediation Panel. Therefore, General Order No. 11-10 governs. *See* Consolidated Declaration of David Crane ¶ 5, Exh. D ("General Order 11-10") § 1.1 ("This General Order [] governs the elective and presumptive referral of certain actions to the Alternative Dispute Resolution (ADR) Program for mediation with a neutral from the Mediation Panel . . . appointed by the Court."). Amongst other things, General Order 11-10 provides for the administration of the ADR Program, *see id.* § 2, the qualifications of the mediators, *see id.* § 3, the referral of cases to the ADR Program, *see id.* § 5, the procedures for conducting the mediation, *see id.* § 8, the confidentiality of the proceedings, *see id.* § 9, and a dispute resolution process for alleged violations of General Order 11-10, *see id.* § 10.

As General Order 11-10 makes clear, this dispute is not properly before this

Court. In particular, Section 10 of General Order 11-10 provides that "a complaint alleging that any person or party has materially violated this Order may be presented informally to the ADR Program Director." *Id.* § 10.1. Otherwise, "[a] formal complaint alleging that any person or party has materially violated this Order must be presented in writing (not electronically) *to the ADR Program Director*, who will refer the matter *to the ADR Judge*." *Id.* §10.2 (emphases added). Thereafter, if the ADR Judge determines that the matter warrants further proceedings, and if the dispute is not informally resolved, "*the ADR Judge* . . . shall take appropriate action," including potentially "issu[ing] an order to show cause why sanctions should not be imposed. . . . The ADR Judge will afford all interested parties an opportunity to be heard before deciding whether to impose sanctions." *Id.* § 10.3 (emphasis added).

CWL has neither filed a formal complaint with the ADR Program Director nor sought to informally resolve this dispute. Rather, in an attempt to circumvent the specific dispute resolution process set forth in General Order 11-10 and to improperly impugn Pinkette, CWL has chosen to file a motion directly with this Court. The Court should not permit CWL to flout this Court's orders and the procedures agreed upon by the parties, and on that basis alone should deny CWL's motion.

The Mediation Confidentiality Agreement, General Order 11-10, and the Local Rules all further confirm that CWL's motion is entirely improper. Specifically, the Mediation Confidentiality Agreement provides that "[n]o written or oral communication made by any party, attorney, mediator or other participant in a mediation in the above-named case may be used ***for any purpose in any pending or future proceeding*** unless all parties, including the mediator, so agree." Dkt. 124-2, Scobie Decl. Ex. A at ¶ 1 (emphasis added) (signed by Merchant & Gould). Similarly, General Order 11-10 provides that "[m]ediation statements ***must not be filed and the assigned judge shall not have access to them***"; "the

contents of the written mediation statements . . . ***shall not be . . . disclosed to the assigned judges***"; and any complaint for a violation of General Order 11-10 "***must neither be filed nor disclosed to the assigned judge***." General Order 11-10 §§ 8.4(b), 9.1, and 10.2 (emphases added). Local Rule 16-15.8 provides the same. *See* L.R. 16-15.8(a) ("'Confidential information' ***shall not be . . . disclosed to the assigned judges*** . . . .") (emphasis added). Indeed, "[o]ne purpose of committing [the] responsibility [of hearing and determining complaints alleging violations of the mediation rules] to one designated [] judge is to preserve the confidentiality of ADR communications to the fullest extent possible-and to assure litigants that no such communications will be disclosed to any judge who could exercise power of the parties' rights in the underlying case." *In re Prohibition Against Disclosing ENE Commc'ns. to Settlement Judges*, 494 F. Supp. 2d 1097, 1097 n.1 (N.D. Cal. 2007) (discussing analogous rules).

CWL not asked Pinkette for permission to use its mediation brief to support its motion, nor has Pinkette authorized such use. Yet CWL has not only improperly brought this mediation-related dispute before this Court, but also has unilaterally decided to file its mediation statement ***directly with this Court***. *See* Dkt. 124-2, Scobie Decl. Ex. B. The Court should not condone CWL's flagrant and willful disrespect of the confidentiality provisions of General Order 11-10, the Local Rules, and the Mediation Confidentiality Agreement.

In sum, by the very fact that CWL has filed this motion (along with its mediation statement), CWL has violated the provisions of General Order 11-10, the Local Rules, and the Mediation Confidentiality Agreement. As CWL should be well aware, this dispute should be resolved ***only*** by the ADR Judge and not this Court. Therefore, the Court should deny CWL's motion. *Accord Dixon v. City of Oakland*, Case No. 12-cv-5207 DMR, 2014 WL 6951260, at *6 (N.D. Cal. Dec. 8, 2014) (admonishing the parties for filing confidential mediation materials in violation of an analogous rule, refusing to consider the parties' arguments, and

striking the parties' briefs); *Postlewaite v. Wells Fargo Bank N.A.*, Case No. 12-cv-4465 YGR, 2014 WL 4768386, at *5 n.9 (N.D. Cal. Sept. 24, 2014) (noting that a motion filed by one of the defendant had been denied "because it ignored the process set forth in the Court's ADR Local Rules," and that even the "very filing of that motion violated the rules, because [the defendant] filed it before the presiding judge in the case instead of the ADR [] Judge.").

B. Even if the Court were inclined to decide this dispute, the harsh sanction of disqualification is not warranted.

Even if the Court were inclined to decide CWL's motion, it is clear that, under Ninth Circuit law, the harsh sanction of disqualification of Pinkette's experts is not warranted under the facts and circumstances giving rise to this dispute.[1]

"Federal courts have the inherent power to disqualify expert witnesses to protect the integrity of the adversary process, protect privileges that otherwise may be breached, and promote public confidence in the legal system." *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1092 (N.D. Cal. 2004) (citation omitted); *see also Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) ("A district court is vested with broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial. . . .," including disqualifying expert testimony.") (citations omitted). There is no bright-line rule for expert disqualification. *Multimedia Patent Trust v. Apple Inc.*, Case No. 10-cv-2618-H (KSC), 2012 WL 12868248, at *2 (S.D. Cal. Aug. 27, 2012). However, "disqualification is a drastic measure that courts should impose only hesitantly, reluctantly, and rarely." *Hewlett-Packard*, 330 F. Supp. 2d at 1092 (citations omitted).

A consideration of the relevant factors reveals that disqualification would be

[1] Notably, in addition to having failed to mention the ADR provisions governing this dispute, CWL has also failed to cite or discuss any authority that would permit the Court to grant the extraordinary relief it seeks.

inappropriate and grossly disproportionate to the severity of the alleged confidentiality breach, especially in light of CWL's own confidentiality breach.

First, although Pinkette does not dispute the general importance of maintaining the confidentiality of mediation materials, any prejudice that could inure to CWL under the circumstances of the breach necessarily would be limited. Notably, the experts to whom Pinkette provided CWL's mediation statement are *rebuttal experts* retained expressly for the purpose of examining the specific opinions proffered by CWL's experts. Thus, because these experts' opinions are limited to the subject matter raised by CWL's experts, there is little risk that they would or even could improperly rely upon anything in the mediation statement.

Indeed, as acknowledged by CWL, both experts confirmed at their depositions that they did not in fact rely on any content in the mediation statement in forming their opinions. *See* Dkt. 124-2, Scobie Decl. Ex. D at 33:17-23 ("Q: Did you rely on [CWL's mediation statement] in preparing these opinions? A: No. Q: And why not? A: I read those for . . . . I read them just for background . . . ."); Ex. E at 58:5-11 ("A: . . . I don't believe that I relied upon the mediation brief to form part of my opinions in this matter.").[2] And CWL can offer no evidence that would suggest that it suffered any actual prejudice, instead raising only vague and unspecified concerns that the review of its mediation statement somehow "may have consciously or unconsciously shaped Pinkette's Experts' evaluations." Dkt. 124 at 2. It is thus apparent that CWL has suffered little, if any, prejudice from the disclosure of its mediation statement.

Second, the disclosure by Pinkette of CWL's mediation statement was

[2] CWL notes that Dr. Isaacson cited its mediation statement for a comment offered in his report. *See* Dkt. 124 at 2. This citation, however, actually *supports* that CWL suffered no prejudice as a result of having its mediation statement shown to Dr. Isaacson—the citation refers to a fact that not only is in the public record, but that CWL itself highlighted in the public version of its opposition to Pinkette's motion for summary judgment, *see* Dkt. 94 at 5.

clearly inadvertent. Indeed, both Dr. Hibbard and Dr. Isaacson candidly disclosed on their expert reports that they received CWL's mediation statement, and further admitted this fact at their depositions. Pinkette has acted with all candor, and there is no suggestion that it disclosed CWL's mediation statement in bad faith or for any improper purpose. Under these circumstances, the Court should not exclude Pinkette's experts under its inherent power to impose sanctions. *See In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003) ("Before imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct."); *Fink v. Gomez*, 239 F.3d 989, 993–94 (9th Cir. 2001) ("[M]ere recklessness, without more, does not justify sanctions under a court's inherent power"; rather, sanctions are available only if the court "specifically finds bad faith or conduct tantamount to bad faith.").

Finally, it would be fundamentally unfair to exclude Pinkette's experts at this late stage in the litigation, on the eve of trial. **CWL knew of the disclosure as early as October 5, 2016**, when Pinkette served its expert reports, and confirmed this no later than October 24, 2016, after questioning Drs. Hibbard and Isaacson on this issue at their depositions. Yet CWL chose to sit on its purported concerns for *nearly two months*, until Pinkette would be left with few if any options for curing any alleged prejudice suffered by CWL.

CWL's delay in raising this issue suggests that it fabricated this dispute in an attempt to gain an unfair advantage over Pinkette and not out of any actual concern regarding the confidentiality breach. Indeed, it is undeniable that if Pinkette's experts were excluded at this stage, Pinkette would be severely and unduly prejudiced, being left with either only last-minute replacement options (the Court permitting)[3] or no expert testimony whatsoever to rebut that of CWL's experts.

[3] If the Court were to exclude Pinkette's experts, Pinkette respectfully requests an opportunity to retain new experts and a continuance of the trial date to complete any related discovery.

The interests of justice do not favor exclusion under these circumstances. *See Hewlett-Packard*, 330 F. Supp. 2d at 1095 (noting that, in deciding whether to disqualify an expert, a court should consider "whether the opposing party will be unduly burdened by having to retain a new expert," and that "[c]onsideration of prejudice is especially appropriate at late stages in the litigation, at which time disqualification is more likely to disrupt the judicial proceedings") (internal quotations and citations omitted); *Multimedia Patent Trust*, 2012 WL 12868248, at *2 (declining to disqualify the plaintiff's experts because the plaintiff "would be disadvantaged if its expert witnesses were disqualified at this [late] stage in the case").

In sum, although this motion is not properly before this Court, the circumstances and nature of the alleged confidentiality breach would not, in any case, warrant the exclusion of Pinkette's experts. *Accord McLean v. Air Methods Corp., Inc.*, Case No. 1:12-cv-241-jgm, 2014 WL 280343, at *7 (D. Vt. Jan. 24, 2014) (declining to exclude the defendant's experts for having been provided confidential mediation materials because the disclosure was inadvertent, nothing confidential was actually disclosed, and neither expert relied on the materials in forming their opinions, and noting that "[t]he extreme sanction of striking both experts from testifying, based on an apparent mistake, is not warranted in this particular case"); *Claude Worthington Benedum Found. v. Harley*, Case No. 12-cv-1386, 2014 WL 3846047, at *5 (W.D. Pa. Aug. 5, 2014) (declining to sanction the defendants for providing their expert with confidential mediation statement because the disclosure was not in bad faith and the plaintiff failed to explain how it had been prejudiced by the disclosure).

III. CONCLUSION

CWL knows that it has suffered no prejudice from the inadvertent disclosure of its mediation statement to Pinkette's rebuttal experts, which is why it waited until the eve of trial to raise its purported concerns. CWL presumably knows that

its motion is procedurally improper, yet brought it anyway to harass and impugn Pinkette before this Court. CWL cannot have it both ways—on the one hand, claiming that Pinkette violated the confidentiality provisions of the parties' mediation agreement, while on the other, *itself violating those very same provisions (and more)*. Indeed, Pinkette has been unfairly prejudiced by the very filing of this motion. For all these reasons, the Court should deny CWL's motion.

Dated: December 23, 2016

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By: /s/ James M. Lee

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